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In The

Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR AND UNITED STATES BUREAU OF INDIAN AFFAIRS,

Petitioners,

v.

KLAMATH WATER USERS PROTECTIVE ASSOCIATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT KLAMATH WATER USERS PROTECTIVE ASSOCIATION

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QUESTION PRESENTED

Whether correspondence between Indian Tribes and the Department of Interior related to ongoing proceedings involving water rights and water allocations in which both the Tribes and Respondent have substantial interests, should be treated as intra-agency memorandums eligible for protections against Exemption 5 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5), based on the Government's assertion that confidentiality is necessary to effectively perform its role as trustee for the Tribes.

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STATEMENT

This case involves Exemption 5 of FOIA, which shields from public disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The United States Department of Interior ("Interior") and United States Bureau of Indian Affairs ("BIA") (collectively referred to herein as the "United States" or the "Government") continue to withhold seven disputed documents identified as correspondence between (i) BIA and/or Interior personnel, and (ii) certain Indian tribes (or their representatives) in the Klamath River Basin. These documents have been withheld on the alleged grounds that the Tribes are essentially "consultants" of Interior due to the trust relationship between the United States and Tribes, and that the correspondence between the United States and the Tribes, therefore, meet the so-called functional test of inter/intra-agency communications. As a result, the United States continues to assert that the documents are exempt from disclosure pursuant to the deliberative process privilege and/or attorney work-product privilege under FOIA Exemption 5.

Factual Background. Respondent Klamath Water Users Protective Association (the "Association") is a non-profit corporation formed under section 501(c)(5) of the Internal Revenue Code. 26 U.S.C. § 501(c)(5). J.A. 66. Most of the members of the Association have contracts with the U.S. Bureau of Reclamation ("Reclamation") providing for the delivery of water through Klamath Reclamation Project facilities for irrigation use. J.A. 66-67. Of these, most are public agencies, primarily irrigation districts, that use

water from the Upper Klamath Lake and Klamath River. J.A. 67. The Association provides information and representation for its members on matters in which they have a common interest, including water resources, agriculture, and other resources issues in or affecting the Klamath River Basin in northern California and southern Oregon.[1] J.A. 73.

The Klamath Reclamation Project was authorized in 1905 as one of the earliest reclamation projects under the Reclamation Act of 1902. 32 Stat. 388, codified as amended at 43 U.S.C. § 372 *et seq*. *See also* Act of February 9, 1905, 33 Stat. 714 (Act authorizing specified actions in connection with Klamath Project). The federal government financed the construction of canals and other facilities to deliver water to arid lands in the Klamath Project area. Landowners and irrigation districts, including many Association members, executed contracts with the Bureau of Reclamation providing for delivery of water through these facilities, and for the water users' repayment of construction costs. J.A. 66-67. Water rights have been perfected under state law for Klamath Project irrigation purposes. *See* Excerpts of Record ("E.R.") 419-420. These

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[1] The Klamath River Basin encompasses approximately ten million acres in south-central Oregon and northern California. The areas that are particularly important for this litigation include Upper Klamath Lake, the Klamath River, and the Klamath Reclamation Project. Upper Klamath Lake in Oregon is formed by the inflow of streams from the upper watershed. A dam at the outlet of Upper Klamath Lake impounds water at high run-off periods for storage and later use. Water can also bypass or be released from the dam, flowing down the Klamath River, over 200 miles to the ocean in California. J.A. 67.

water rights are the property of the water users (*see* Or. Rev. Stat 540.510 (water rights appurtenant to land); *Nevada v. United States*, 463 U.S. 110, 124-125 (1983); E.R. 419), and are recognized in Article III.A. of the Klamath River Basin Compact. Chap. 142, Oregon State Laws 1956 (Or. Rev. Stat. § 542.620); Cal. Stat. ch. 113 (1957) (Water Code, § 5901); Pub. L. No. 85-222, 71 Stat. 497. The Klamath Project currently serves approximately 230,000 acres of irrigated land, supporting thousands of families and their rural communities. J.A. 67.

Klamath Project irrigation water users and four tribes (the Klamath, Yurok, Hoopa Valley and Karuk Tribes, collectively referred to throughout this litigation as the "Klamath Basin Tribes" or "Tribes") intensely compete for water in a number of inter-related forums. In all of these forums, each Tribe seeks to reallocate Klamath Project water from current irrigation uses to its preferred uses. The major source of water stored for irrigation use in the Klamath Project is Upper Klamath Lake. J.A. 67. The Klamath Tribe, with fisheries located in or near Upper Klamath Lake, demands that more water be held in the lake. The Yurok, Hoopa Valley and Karuk Tribes demand increased releases from the lake to the Klamath River, to benefit their downstream fisheries. J.A. 117-118; Pet. App. 2a. Either of such actions results in the unavailability of water for Klamath Project irrigation. J.A. 67-68. Each Tribe advocates its interests strenuously with Interior, making scientific, legal and political arguments to support its own positions, and to obtain favorable actions from Interior. J.A. 68-69; E.R. 292-303, 309-311, 357, 361. Many actions advocated by the Tribes in these forums

would be detrimental to members of the Association. J.A. 67-68; Pet. App. 2a.

The Association brought this action under FOIA to obtain certain documents withheld by the United States that are related to these contentious disputes regarding water resources in the Klamath River Basin. All of these disputes revolve around the common issue of how much of the water in the Klamath Basin will be devoted to Klamath Project irrigation versus how much water will be allocated instead to supporting fisheries of importance to the Tribes. The goal of the Tribes is to allocate more water for instream use for the enhancement of these fisheries. *Id.*

One forum involving competition for water, and the principal forum giving rise to this case, is Interior's development of short-term and long-term Klamath Project Operations Plans (KPOPs), which began in approximately 1995.[2] E.R. 472-475. As noted, irrigation water rights in the Klamath Project are recognized by an interstate Compact ratified by Congress (see p. 2, *supra*), and contracts between Reclamation and its project irrigators that provide for use of this water on irrigated lands. Pet. App. 2a. The KPOPs, however, have been developed by Interior to prescribe the allocation of Klamath Project water supplies among tribal interests and irrigation interests. The KPOPs also are based on providing water for fish species listed as threatened or endangered under the Endangered Species Act. 16 U.S.C. § 1531 *et seq.* Such species are also claimed as trust assets by the Tribes. E.R.

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[2] Four of the withheld documents were transmitted in connection with the KPOP process. J.A. 40-48; *see also* note 7, *infra*.

581. Several Interior agencies, including the BIA, participate in KPOP preparation (E.R. 163, 169, 174 (describing KPOPs as a "multi-agency collaboration")), and KPOPs recently have been issued by Interior as a whole. *See, e.g.*, U.S. Department of Interior, Klamath Project 1998 Annual Operations Plan, Environmental Assessment.

The development of the KPOPs has been an extremely contentious process, involving irrigators, the Tribes, several environmental interests, and Interior agencies. J.A. 68-72, 115-118; E.R. 343, 423-426, 437.[3] During the early development of the KPOPs, the disputes included frequent demands by the Tribes that irrigation deliveries be severely curtailed or stopped entirely, and threats by the Tribes of lawsuits against Interior regarding how the Project was being operated. J.A. 71-72, 85, 89-101, 115-135. In 1995, Interior announced that it intended to prepare a long-term operations plan (i.e., a KPOP which would cover more than one irrigation season). J.A. 68; E.R. 288. In 1996, while in the process of preparing the long-term KPOP, Interior retained an independent consultant firm to analyze technical issues concerning water needs of fish and agriculture and other subjects. J.A. 69.[4]

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[3] The Association strenuously disputes Interior's authority to allocate water based on its own subjective determinations of water rights outside an adjudicatory process. E.R. 440. The Association's position is supported by the Attorney General of Oregon. E.R. 421-427. Nonetheless, the KPOPs proceed.

[4] *See also* 1995 Memorandum of Agreement For the Government-to-Government Relationship in the Development of the Klamath Project Operations Plan, between the Klamath Basin Tribes and various Interior agencies, acknowledging that

The long-term KPOP development process was open to all participants, with assurances given that it would remain an open, public process. J.A. 69-71; E.R. 474-475. Interior assured the parties that neither irrigators, Tribes, nor other parties outside of the federal government would have an opportunity to review the long-term KPOP before a draft plan was released publicly. J.A. 71. Irrigation representatives, as well as tribal representatives and attorneys hired by the Tribes, participated in the KPOP process and provided information and argument in support of their position. J.A. 71-82; E.R. 285-416. This participation involved each party advocating its legal and technical positions over whether and how much water should be allocated to the unadjudicated tribal water rights and species listed under the ESA, and whether Interior can require farmers to forego use of water. J.A. 115-116; E.R. 394, 439. Ultimately, a draft long-term KPOP was prepared for internal review of Interior agencies. J.A. 71. Tribes advocated, however, against a long-term KPOP, fearful it would be detrimental to their positions. E.R. 381. No draft long-term KPOP was released for public review and comment. Instead, since that time, the KPOPs have been released on an annual basis for each irrigation season. J.A. 71-72.

Another forum where Klamath Project water users and Tribes assert conflicting interests is the general stream adjudication of the Klamath River Basin being

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an independent consultant had been hired to conduct the bulk of the technical work related to the KPOP, and that the Tribes will provide comments to the consultant. J.A. 61-62.

conducted by the State of Oregon (hereinafter, the "adjudication").[5] In this adjudicatory process, the State of Oregon will determine and quantify currently unadjudicated water rights, including rights initiated before 1909 (such as Klamath Project irrigation water rights) and federal "reserved" rights (such as tribal claims, national forests, wildlife refuges). See *United States v. Oregon*, 44 F.3d 758, 762 (9th Cir. 1994), *cert. denied*, 516 U.S. 943 (1995). The Yurok, Hoopa Valley and Karuk Tribes are not parties to the adjudication. However, the Klamath Tribe, whose former reservation was upstream of Upper Klamath Lake, claims the benefit of a federal reserved water right in Upper Klamath Lake to maintain lake elevations for the ostensible benefit of fisheries and other resources in the lake. The United States Department of Justice, on behalf of the United States as trustee, has filed a claim in the adjudication for determination of this federal reserved water right, and independently, the Klamath Tribe has, through its own attorneys, filed a parallel claim for the same water right in Upper Klamath Lake. J.A. 80.[6] Irrigation water users have filed claims for determination of rights for irrigation in the Klamath Project, and the

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[5] In the Matter of the Determination of the Relative Rights to the Use of Waters of the Klamath River and Its Tributaries, currently before the Water Resources Director of Oregon. Three of the documents withheld in this case were submitted in connection with the adjudication. J.A. 44-77; *see also* note 7, *infra*.

[6] Most claims filed by the Klamath Tribe in the adjudication, including the claim in Upper Klamath Lake, are identical to the claims filed by the United States, but they still stand as distinct and separate claims. In at least one instance, there is a difference in the quantity of water claimed by the Tribe and the United States in the claims on file..

United States has filed parallel water right claims to assert and protect irrigation water rights in the Klamath Project. J.A. 80; E.R. 596-597. While the United States and the irrigation water users in the Klamath Project dispute the ownership of the irrigation water rights, they have cooperated in the preparation of their parallel claims of water rights for irrigation. In the adjudication proceeding, parties will dispute whether and in what amounts water must be held in Upper Klamath Lake for fish species, to the detriment of irrigation water users.

Proceedings in this Case. This case arose after the Association submitted several FOIA requests to Interior agencies, including the BIA, for documents provided to, or received from, the Klamath Basin Tribes pertaining to water resources issues in the Klamath River Basin. These requests were made primarily to discern what information was being exchanged with interested parties during Interior's preparation of the draft long-term KPOP. *See* Pet. App. 3a. Specifically, Association members were concerned that the draft long-term plan had been shared with the Tribes (despite Interior's representations that this would not occur), and that objections of the Tribes had led to the "vetoing" of the plan. J.A. 71. In addition, the Association's FOIA requests were made only after Interior had freely provided to the Tribes, pursuant to the Tribes' own earlier FOIA requests, copies of communications between the Association members and the United States regarding the KPOP and the adjudication. J.A. 81, 102-110; Pet. App. 37a.

In its initial responses to the Association's FOIA requests, the BIA released some documents, but refused

to disclose approximately forty (40) responsive documents on the grounds that they were exempt from disclosure pursuant to the FOIA Exemption 5. E.R. 23-30, 64-73. Subsequently, the BIA released on a piecemeal basis a number of documents that had been initially withheld, and the Association withdrew its requests as to certain other withheld documents that were either provided to the Association by another Interior agency (*i.e.*, Reclamation), or were eventually described in enough detail in the United States' *Vaughn* index and declarations to satisfy the Association that the documents were likely exempt. *See Vaughn v. Rosen*, 484 F.2d 820, 824 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); J.A. 78; E.R. 37-38, 123-132, 381-404, 486-499. The seven documents remaining in dispute, consisting of a total of 31 pages, are described in the United States' *Vaughn* index and declarations as: (i) three items of correspondence provided by the Tribes to Interior in connection with the KPOP; (ii) a memorandum from Interior to the Tribes in connection with the KPOP; and (iii) three items of correspondence from the Klamath Tribe to Interior in connection with the adjudication.[7] The United States asserts that the

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[7] One of the withheld documents, identified as Document 3, FOIA Appeal 96-168, has at times been characterized as addressing both the KPOP and the adjudication. *See* Govt. Br. 11; J.A. 40-41; Pet. App. 17a, 23a. In its own declaration, however, the Government admits that "the document discusses the issues therein specifically in terms of the Operations Plan development." E.R. 470. The Government's declarant attempts to explain away the specific content of the document by asserting that he and the author had discussed how the issues in the document apply equally to both the KPOP and the adjudication, and "[s]ince that time, I have always considered

deliberative process privilege protects all seven documents from disclosure, and that the attorney work-product privilege applies as an additional basis for withholding two of the seven documents. *See* J.A. 40-48; Pet. App. 6a-7a; *see also* Index to Documents Remaining in Dispute, Appendix, *infra*, 1a.[8]

This case was originally referred to a magistrate judge, who recommended that the Government's motion for summary judgment be granted on the basis that the withheld documents were protected from disclosure under Exemption 5. The magistrate judge found that all of the documents qualified as inter/intra-agency communications, and that they were shielded from disclosure by the deliberative process privilege and/or the attorney work-product privilege. Pet. App. 56a-61a. The district court adopted the magistrate's findings and recommendations, and entered judgment for the Government. Pet. App. 31a-32a.

The court of appeals reversed. Pet. App. 1a-30a. The court declined to apply in this case the "functional test" expansion of FOIA Exemption 5 that has been adopted by other courts of appeals, and held that "the documents fail[ed] to meet the threshold inter-agency/intra-agency

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the issues analyzed in that document as inextricably linked with both the Operations Plan development and the Oregon adjudication process." *Id.* This "perception" of the document obviously does not alter its specific content. Thus, only three documents truly address the adjudication.

[8] A previous version of this index was attached as an exhibit to the Association's reply brief on the merits in the Ninth Circuit, and in the Appendix to Respondent's Brief in Opposition herein, without objection by the United States.

test" under Exemption 5. Pet. App. 10a. The court found that this case is distinguishable from those where the "functional test" has been applied, emphasizing that the Tribes have asserted conflicting claims against the Association, and that the Tribes have a direct interest in the subject matter of the submissions – e.g., Interior's decisions with respect to the KPOP, and Interior's decisions regarding the scope and extent of the various claims to be filed by the United States in the adjudication. Pet. App. 6a-8a. The court of appeals found that "consultation with the tribes is not similar to 'the advice from staff assistants and exchange of ideas among agency personnel' that forms the object of exemption five. . . . " Pet. App. 9a. Having concluded that the withheld documents did not meet the threshold inter/intra-agency test, the court of appeals determined that it "need not reach the other issues raised by the Association," which include whether the withheld documents were deliberative, and whether the district court properly exercised its discretion in conducting an *in camera* review of the documents. Pet. App. 10a.

SUMMARY OF THE ARGUMENT

The Government in this case essentially asks the Court to rewrite the language of FOIA Exemption 5 to recognize a wholly new exemption to FOIA based upon the Government's trust responsibilities to Indian Tribes. To do so would obviously contravene this Court's decisions and Congressional mandates that the exemptions to FOIA must be construed narrowly. The documents at issue in this case comprise communications between the

Government and Indian Tribes that have a direct interest in the outcome of the Government's decisions and actions involving competing claims to valuable water rights. The Government alludes variously to a number of grounds of privilege, and an alleged necessity for confidentiality under its trust relationship with the Tribes, to assert that the documents are intra-agency in nature and protected from disclosure under Exemption 5. However, nothing in FOIA – a statute whose dominant objective is disclosure not secrecy, and whose exemptions have been consistently given a narrow compass – even suggests, much less requires, that a judicial gloss be placed on the construction of Exemption 5 to extend its protections to parties directly interested in the outcome of an agency's decisions or actions.

As the court of appeals correctly held, the argument that the communications at issue here are "intra-agency" in nature fails. The Tribes are not neutral participants in the Government's deliberative decisionmaking process, but are interested advocates pressing for a particular outcome affecting not only their water rights claims, but also the water rights claims of Respondent's members and the United States. Directly interested parties are not the kind of neutral hired experts that could be considered the functional equivalent of agency staff, and relied upon by agency decisionmakers to provide frank and objective advice. Rather, interested parties are advocates of their own particular interests, and, when communicating with an agency decisionmaker, they understandably seek to influence the agency's decisionmaking process in a way most favorable to them.

Stripped to its essence, the Government's claim in this case is that its trust relationship with the Tribes is sufficient to qualify the withheld documents as intra-agency communications. The Government's request to expand Exemption 5 on this basis ignores the fact that the trustee-beneficiary relationship confers no privilege against disclosure. This claim also ignores the fact that in making its decisions in the underlying proceedings, the Government must necessarily consider and represent the interests of both the Tribes and the Respondent's members. Moreover, the Government's attempt to expand the reach of Exemption 5 to protect communications occurring within the purview of this trust relationship would, for all practical purposes, implicate nearly all communications between Indian Tribes and the United States. This expansion is particularly unnecessary given that under other circumstances, grounds may exist under other FOIA exemptions to withhold information shared by Indian Tribes with the United States. As we explain below, this Court should not countenance the Government's claim that its trust relationship with the Tribes satisfies the intra-agency test, or otherwise provides a privilege against disclosure, under FOIA Exemption 5.

ARGUMENT

Under the plain language of the statute, FOIA makes available to any person all federal agency records, 5 U.S.C. § 552(a), with the exception of just nine specifically enumerated categories of records. 5 U.S.C. § 552(b). FOIA's provisions are clear and unambiguous that the nine exemptions are exclusive, and that documents must

be made available "except as specifically stated." 5 U.S.C. § 552(d). This Court has observed that Congress's intent in enacting FOIA was to "open agency action to the light of public scrutiny" (*Department of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 772 (1989) (citation omitted)), and in so doing to "clos[e] the 'loopholes which allow agencies to deny legitimate information to the public.' " *Department of Justice v. Tax Analysts*, 492 U.S. 136, 148, 150 (1989) (quoting *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375, 385 (1980)). The legislative history, moreover, evinces Congress' concern that section 3 of the APA, the precursor to FOIA, was full of "loopholes" to disclosure, which agencies used to "cover up embarrassing mistakes or irregularities." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965); *see also Freedom of Information Act Sourcebook, Legislative Materials, Cases, Articles*, S. Doc. No. 93-82, 93d Cong., 2d Sess. 7 (1974).[9]

Accordingly, a chief aim of FOIA's enactment was to "set[ ] up workable standards for the categories of records which may be exempt from public disclosure, replacing the vague phrases 'good cause found,' 'in the public interest,' and 'internal management' with specific definitions of information which may be withheld." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 2 (1966). In enacting FOIA, Congress stated that "[i]t is the general purpose of

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[9] Congress noted that the APA's vague standards for exempting disclosure had "been subject to conflicting interpretations, often colored by personal prejudices and predilections," thereby defeating "the very purpose for which it was intended – the public's right to know the operations of Government." S. Rep. No. 813, *supra* at 8.

the present bill . . . to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language. . . . " *Id.* at 3. Congress thus required agencies to adhere to "a general philosophy of full agency disclosure." *Tax Analysts*, 492 U.S. at 142 (citation omitted) (quoting S. Rep. No. 813, *supra* at 3). "Congress believed that this philosophy, put into practice, would help 'ensure an informed citizenry, vital to the functioning of a democratic society.' " *Tax Analysts*, 492 U.S. at 142, quoting *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

In addressing the nine specific exemptions from disclosure under the Act, this Court has stated that "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Thus, "[c]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass." *Tax Analysts*, 492 U.S. at 151. Justice O'Connor has explained that Congress sought "to insulate its product from judicial tampering and to preserve the emphasis on disclosure by admonishing that the 'availability of records to the public' is not limited, 'except as *specifically* stated.' " *Federal Bureau of Investigation v. Abramson*, 456 U.S. 615, 642 (1982) (dissenting opinion) (emphasis in original), quoting 5 U.S.C. § 552(c) (now codified at 5 U.S.C. § 552(d)). Accordingly, this Court has emphasized that FOIA's exemptions must be "narrowly construed." *Federal Bureau of Investigation*, 456 U.S. at 616; *Reporters Committee for Freedom of Press*, 489 U.S. at 772-773; *Department of Justice v. Julian*, 486 U.S. 1, 8 (1988); *Department of Air Force*, 425 U.S. at 361.

The Government in this case essentially asks the Court to recognize a wholly new FOIA exemption by rewriting the language of Exemption 5.[10]

To do so would obviously run counter to this Court's decisions construing the statute.

THE WITHHELD DOCUMENTS ARE NOT PROTECTED UNDER EXEMPTION 5, WHICH PROTECTS ONLY INTER/INTRA-AGENCY DOCUMENTS THAT ARE NORMALLY PRIVILEGED IN THE CIVIL DISCOVERY CONTEXT

Exemption 5 permits federal agencies to withhold "inter-agency or intra-agency memorandums or letters

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[10] The Government makes no claim – and this Court obviously has not granted certiorari – on any issues concerning the interpretation of any other FOIA exemptions. In evaluating the Government's policy-oriented arguments for reading Exemption 5 in a manner belied by its language and prior interpretation, though, it is noteworthy that grounds may sometimes exist under other exemptions for withholding from FOIA disclosure certain information shared by Indian Tribes with the United States. As even some of the *amici* acknowledge (Klamath Tribes Br. at 14; United South and Eastern Br. at 19), FOIA Exemption 4 protects "commercial or financial information obtained from a person [that is] privileged *or confidential*." (emphasis added). There is no requirement that such information be "intra-agency" in character, and Exemption 4 is not limited to material which would be privileged against disclosure in litigation. The availability of this exemption to protect trade secrets and genuinely sensitive commercial information makes all the more unreasonable the Government's plea for a rewriting of Exemption 5 to assure the protection of confidences shared with it by the Tribes pursuant to their trustee-beneficiary relationship.

which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This Court repeatedly has interpreted this exemption as "incorporat[ing] the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context." *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); *see also Julian*, 486 U.S. at 11; *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984); *Federal Trade Commission v. Grolier*, 462 U.S. 19, 26 (1983). Indeed, the Court has stated that Exemption 5 protects "*those documents, and only those documents*, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (emphasis added); *Renegotiation Board*, 421 U.S. at 18; *Weber*, 465 U.S. at 799; *Julian*, 486 U.S. at 11; *see also* S. Rep. No. 813 *supra* at 9 (the purpose of Exemption 5 is to exempt only those documents "which would not be available by law to a private party in litigation with the agency."). Thus, "[t]he test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance" in civil litigation with the agency. *Grolier*, 462 U.S. at 26; *Julian*, 486 U.S. at 12.

Accordingly, for Exemption 5 to apply, the Government must establish that the withheld documents "(a) are 'inter-agency or intra-agency memorandums or letters,' and (b) consist of material that 'would not be available by law to a party . . . in litigation with the agency.' " *Federal Open Market Comm. v. Merrill*, 443 U.S. 340, 352 (1979). Here, because the documents withheld by the United States are not "inter/intra-agency" correspondence, and

because there is no recognized privilege or other protection that would shield the documents from disclosure in civil litigation against Interior, Exemption 5 does not apply. The court of appeals, therefore, correctly held that the documents must be disclosed.

A. The Documents in Issue Are Not "Intra-Agency Memorandums" Because the Tribes Have a Direct Interest in the Government's Decisions And Actions At Issue

The Klamath Basin Tribes, by the Government's admission, are "outside the government." Brief For The Petitioners ("Govt. Br.") 2. Indeed, the Tribes are sovereign nations whose interests in maintaining high Upper Klamath Lake levels and/or increasing releases to the Klamath River are at stake in the Interior KPOP proceedings, and are directly adverse to those of the irrigators that the Association represents. Pet. App. 2a. Six of the seven withheld documents are correspondence from the Tribes (or their representatives) to Interior personnel. The remaining document is a BIA memorandum addressed to, among others, attorneys hired by the Tribes. J.A. 40-48. Thus, none of the documents at issue in this case are literally "inter-agency or intra-agency" documents under FOIA Exemption 5. Nor, consistent with fundamental notions of fairness and due process, could they be.

Common sense rebels at the thought that directly interested parties could be permitted to conduct secret, ex parte communications with an agency decisionmaker balancing competing claims to valuable water rights. Directly interested parties are not the kind of neutral

hired experts that some courts of appeals have described as the "functional equivalent of agency staff" relied upon by agency decisionmakers to provide frank and objective advice. *See, e.g., United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1218 (D.C. Cir. 1980). Rather, interested parties are advocates of their own particular interests, and, when communicating with an agency decisionmaker, they understandably seek to influence the agency's decisionmaking process in a way most favorable to them. Such communications should be disclosed in order to ensure that the public can evaluate the impact that interest groups may have on agency policies and decisions. The public's interest in preventing self-dealing, collusion or overreaching on the part of the special interest is preeminent, and should outweigh any claim to secrecy. *See* Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 Col.L.Rev. 895, 942 (1974).

Accordingly, administrative law has long reflected antipathy toward interested parties' attempts to skew agency decisionmaking by way of ex parte communications. In fact, FOIA's direct predecessor – Section 3 of the APA as enacted in 1946 – was aimed squarely at preventing interested parties from secretly skewing governmental decisionmaking: "Administrative operations and procedures are public property, which the general public, *rather than a few specialists and lobbyists*, are entitled to know." H.R. Rep. No. 752, 79th Cong., 1st Sess. 198 (1945) (emphasis added). Moreover, the current version of the APA specifically prohibits ex parte contacts with agency decisionmakers in the context of formal rulemaking and formal adjudication. *See* 5 U.S.C. §§ 551(14), 557(d)(1).

This Court has held that ex parte communications are also improper even in less formal agency actions. In *Morgan v. United States*, 304 U.S. 1 (1938), this Court reviewed a "quasi-judicial" action of the Secretary of Agriculture fixing maximum allowable rates for livestock sales commissions. *Id.* at 19. The Bureau of Animal Industry opposed the livestock brokers at the rate hearings, prepared findings, and submitted the findings to the Secretary for final decision without affording the brokers an opportunity for examination. *Id.* at 17. The Court held that whatever the "form of the proceeding," it "had all of the essential elements of contested litigation" and that the "right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Id.*

Morgan's holding is reflected in numerous lower federal court decisions, which also emphasize *Morgan*'s constitutional footing: "Where agency action resembles judicial action, where it involves formal rulemaking, adjudication, or quasi-adjudication among conflicting private claims to a valuable privilege, the insulation of the decisionmaker from ex parte contacts is justified by basic notions of due process to the parties involved." *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981); *accord, e.g., National Small Shipments Traffic Conference, Inc. v. ICC*, 590 F.2d 345, 350 (D.C. Cir. 1978); *United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, 539-40 (D.C. Cir. 1978); *Action for Children's Television v. FCC*, 564 F.2d 458, 475 (D.C. Cir. 1977); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55-56 (D.C. Cir. 1977); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959). Indeed,

in the past, the government has been a key proponent of this position (*see Sangamon Valley*, 269 U.S. at 224), and federal agencies generally have embraced it as well (*see Ex Parte Communications in Informal Rulemaking Proceedings*, 42 Fed. Reg. 54,253 (Oct. 5, 1977); J. Lubbers, *A Guide to Federal Agency Rulemaking* 230-33 (3d ed. 1998)).

These cases stress that "secrecy" of communications is "inconsisten[t] . . . with fundamental notions of fairness implicit in due process." *Home Box Office*, 567 F.2d at 56. Disclosure of interested party communications helps "to afford adequate safeguards to private interests" by avoiding the "potential for unfair advantage" to a subset of interested parties. *Action for Children's Television*, 564 F.2d at 472, 475, 477; *see also United States Lines*, 584 F.2d at 534 (preserving "adversarial comment among the parties" ensures that they "are afforded the opportunities guaranteed them . . . meaningfully to participate"). These protections are particularly crucial where the proceedings "involve[ ] competitive interests of great monetary value and confer[ ] preferential advantages." *Home Box Office*, 567 F.2d at 62 (Mackinnon, J., concurring specially); *see, e.g., Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 446 (1915) (agency action triggers due process concerns where "[a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds"). And, as in *Morgan*, these cases emphasize that it is the substance of the agency proceeding, and not the label attached, that triggers the due-process-mandated prohibition on ex parte communications. *See, e.g., Action for Children's Television*, 564 F.2d at 475 & n.29; *Sangamon Valley*, 269 F.2d at 224.

Interior's KPOP process is itself an administrative proceeding that triggers due process concerns. In creating the KPOP, Interior attempts to resolve "conflicting claims to a valuable privilege" (*Sierra Club*, 657 F.2d at 400) – *i.e.*, water from the Klamath River Basin. Pet. App. 3a. Both the Tribes' and the irrigators' communications to Interior seek to influence the agency's decisionmaking process in order to protect their extremely valuable, and conflicting, water rights. Decisions made by Interior based upon tribal advocacy will affect Association members' water rights and, indeed, their very livelihoods. Moreover, at the outset of the KPOP proceeding, Interior assured interested parties it would conduct the proceeding as "an open, public process in which no interest would receive special or preferred treatment." Pet. App. 36a; J.A. 69. Accordingly, "basic notions of due process" (*Sierra Club*, 657 F.2d at 400) require that the KPOP proceedings remain open to all interested parties.

Although the Government distinguishes the adjudication from the KPOP, because the State of Oregon will be the ultimate "decisionmaker" in the former (Govt. Br. 42), the concerns regarding secret communications in the context of the Government's proceedings in the adjudication are no less important. As noted above (see pp. 7-8 *supra*), the project water users and the Klamath Tribe have each filed distinct claims in the adjudication. The United States has filed parallel federal reserved water rights claims to benefit the Tribe, and project irrigation water rights claims to benefit the water users. In determining how to proceed with its parallel claims, the United States will necessarily be making decisions as to how best to advocate the inherently competing interests of the Tribe and

the project water users, a decisionmaking process that the Government admits is "closely related" (Govt. Br. 45 n.19) to the KPOP proceedings. *See Nevada*, 463 U.S. at 128; *see also* pp. 39-40, *infra*. Thus, the same basic fairness concerns that must prohibit ex parte communications in the KPOP proceedings should likewise prohibit secret advocacy by the Tribe designed to influence the Government's adjudication positions.

Nothing in FOIA – a statute whose "dominant objective" is "disclosure, not secrecy" (*Department of Air Force*, 425 U.S. at 361) and whose exemptions "have been consistently given a narrow compass" (*Tax Analysts*, 492 U.S. at 151) – even suggests, much less requires, that a judicial gloss be placed on the definition of "intra-agency" to extend Exemption 5 to parties directly interested in the outcome of an agency's decision. FOIA "does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memorandum." *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir. 1970); *accord Stokes v. Brennan*, 476 F.2d 699, 703 (5th Cir. 1973). Indeed, the lack of basic fairness here is exacerbated by the Government's policy of freely providing the Tribes with copies of communications between the Association members and Interior regarding the Association's advocacy on these very same issues. J.A. 81, 102-110; Pet. App. 37a; *see, e.g., State of North Dakota v. Andrus*, 581 F.2d 177, 181 (8th Cir. 1978) ("The selective disclosure exhibited by the Government in this action is offensive to the purposes underlying the FOIA and intolerable as a matter of policy.").

In summary, as the court of appeals held (Pet. App. 9a-10a), the argument that the tribal communications at

issue here are "intra-agency" in nature fails. The Tribes are not neutral participants in a deliberative decision-making process, but are interested advocates pressing for a particular outcome. The Committee Reports accompanying FOIA explained the purpose of Exemption 5 was to encourage frank communications from agency staff. ("Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended . . . that advice from *staff assistants* and the exchange of ideas among *agency personnel* would not be completely frank if they were forced to 'operate in a fishbowl.' ") H.R. Rep. No. 1497, *supra* at 10 (emphasis added); *see also* S. Rep. No. 813, *supra* at 3. This emphasis on frank and candid agency discussions indicates that a broad underlying purpose behind Exemption 5 was to incorporate the deliberative process privilege. *See also EPA v. Mink*, 410 U.S. 73, 86 (1973) ("Congress intended [in Exemption 5] to incorporate the generally recognized rule that 'confidential intra-agency opinions . . . are privileged from inspection.' ") As discussed below, the documents are not subject to withholding based upon the deliberative process privilege, which provides a further basis as to why the documents do not qualify as intra-agency communications.

B. The Documents in Issue Would Not Be Privileged Against Discovery in Civil Litigation with the United States

Exemption 5 can apply only if the documents would also be protected against disclosure in litigation by an existing privilege. Throughout its brief, the Government alludes variously to a number of grounds of privilege,

and an alleged necessity for confidentiality under the United States' trust relationship with the Tribes, to assert that the documents are intra-agency in nature and exempt from disclosure. As discussed below, however, there are no recognized grounds of privilege that would bar discovery of the disputed documents in the context of civil litigation against the Government. By nonetheless refusing to disclose the documents, the Government essentially advocates a return to pre-FOIA standards, expressly rejected by Congress, allowing withholding whenever an agency claimed "good cause" or a "public interest" for doing so. *See* p. 14, *supra*.

1. The Deliberative Process Privilege Does Not Apply to the Withheld Documents Because the Tribes Are Self-Interested Advocates, Not Neutral Consultants

With regard to each of the seven challenged documents, the Government relies primarily on the "deliberative process privilege" to justify its refusal to disclose them (Govt. Br. 20). *See also* App., *infra*, 1a. This privilege is of recent vintage, developed significantly only in the last twenty years and tracing its origin to a 1958 Court of Claims decision that held "intra-office advice on policy" is privileged from discovery to encourage "the policy of open, frank discussion between subordinate and chief concerning administrative action." *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 945-46 (Ct. Cl. 1958); *see generally* 26A C. Wright & K. Graham, *Federal Practice and Procedure* § 5680 at 125-26 (1992). As such, courts have limited application of the privilege to

"intra-governmental communications" that are "predecisional," – *i.e.*, "generated before the adoption of an agency's policy or decision" – and "deliberative" – *i.e.*, "containing opinions, recommendations, or advice about agency policies." *Id.* at 133-35 (collected cases).

This Court has held that FOIA Exemption 5 incorporates a deliberative process privilege in order "to prevent injury to the quality of agency decisions." *NLRB*, 421 U.S. at 151; *accord, e.g., EPA*, 410 U.S. at 91. This Court has also stated that the "purpose of the privilege for predecisional deliberations is to ensure that a decision maker will receive the unimpeded advice of his associates. The theory is that if advice is revealed, associates may be reluctant to be candid and frank." *Federal Open Market*, 443 U.S. at 359-360. The Court, however, has never delineated the precise contours of the deliberative process privilege. Nonetheless, the drafters of FOIA Exemption 5 stated clearly their intent to "delimit the exception as narrowly as consistent with efficient Government operation" (S. Rep. No. 813, *supra* at 10), and interpretations of Exemption 5 are "an important source of law on the scope of the [deliberative process] privilege" (2 S. Stone & R. Taylor, *Testimonial Privileges* § 9.26 at 9-24 (2d ed. 1993)).

Because the deliberative process privilege is designed to protect "intra-governmental" communications, communications with persons outside the agency are generally unprotected. *See, e.g., ITT World Comm., Inc. v. FCC*, 699 F.2d 1219, 1238 (D.C. Cir. 1983), *rev'd on other grounds*, 466 U.S. 463 (1984). In discovery disputes, however, some

courts of appeals have stretched the "intra-governmental" requirement to include some outside "consultants." *See, e.g., First Eastern Corp. v. Mainwaring*, 21 F.3d 465, 468 (D.C. Cir. 1994); 26A Wright & Graham, *supra*, § 5680 at 135-36 (collected cases). A number of courts of appeals have likewise expanded the concept of "intra-governmental" communications in the specific context of FOIA litigation. *See* note 11, *infra*. None of these cases where the "intra-governmental" or "intra-agency" requirement was expanded, however, involved communications from interested "consultants" who stood to benefit from the outcome of the agency decision for which they were consulted.

Those courts that have expanded the intra-agency requirement have generally done so because in some instances a government agency requires information that it is unable to obtain from its own staff, and therefore, it must retain neutral experts outside the agency to obtain information. This retention of neutral experts is generally regarded as the equivalent of obtaining advice from staff assistants. This arrangement is obviously necessary in order to prevent the creation of an uncontrollably large federal bureaucracy. It would be wasteful and unwieldy (if not impossible) for agencies to permanently employ a wide range of experts in anticipation of uncertain needs. *See* 74 Col.L.Rev. at 941-942 (1974). In addition, the D.C. Circuit has noted that experts may not be candid with the agency (or will be unwilling to provide the agency with information at all) unless the expert's opinions and advice can be given "without fear of publicity." *Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971).

This use of unbiased, neutral outside experts, however, stands in stark contrast to an agency's consultation with a party that has a particular interest in the agency's policy or decision. Under those circumstances, disclosure protections are not necessary to induce the entity's provision of information to the agency, because the party's self-interest in the outcome of the decision presents an incentive for a full exposition of the party's views. This incentive should be more than ample to overcome any inhibiting effects of disclosure. *See* Note, *Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 Harv.L.Rev. 1047, 1065 (1973). Even the Government acknowledges this possibility. *See* Govt. Br. 36-37.

The "functional test" that has been created and applied by several of the courts of appeals to expand the inter/intra-agency requirement of Exemption 5 is not expressly set forth in the statutory language. None of the cases in which the functional test was satisfied involved communications from "consultants" who had a direct and personal interest in the outcome of the agency decision for which their "advice" was given.[11] None of these

[11] *See, e.g., Formaldehyde Institute v. Department of Health & Human Servs.*, 889 F.2d 1118 (D.C. Cir. 1989) (review letter submitted by scholarly journal's review panel to Dept. of Health & Human Services); *Public Citizen, Inc. v. Dept. of Justice*, 111 F.3d 168, 177 (D.C. Cir. 1997) (communications between former President Bush and National Archives and Records Administration); *CNA Financial Corp. v. Donovan*, 830 F.2d 1132 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988) (report prepared by consultant retained by the Office of Federal Contract Compliance Programs); *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980) (non-factual portions of congressional responses to Justice Department questionnaires); *Wu v. National Endowment for the Humanities*, 460 F.2d 1030 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973) (report prepared by consultants retained by National Endowment for the Humanities); and *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971) (report prepared by panel of experts convened by Office of Science and Technology).

consultants, moreover, had existing or potential adversarial relationships with the involved agencies, or with other stakeholders that had an interest in the agency decision for which the "consultant" had provided input. This case, thus, is quite distinguishable from those where the "functional test" has been applied.

Here, the Tribes have asserted conflicting claims against the Association, and the Tribes have a direct interest in the subject matter of the consultations – e.g., Interior's decisions with respect to the KPOP, and its decisions regarding the scope and extent of the various claims to be filed and pursued by the United States in the adjudication. The Tribes' direct interest in the outcomes of the decisions for which their "advice" is offered is entirely dissimilar to the advice from staff assistants and the exchange of ideas among agency personnel that is the object of Exemption 5. Indeed, this case is replete with evidence that the Tribes are non-neutral, interested parties who seek to benefit from favorable decisions by Interior agencies regarding Klamath Project operations, which would conversely be to the detriment of the Project irrigators. J.A. 67-68; Pet. App. 2a. The Tribes, moreover, are past, present, and potential future adversaries of both Interior and the Project irrigators with respect to the decisions being made in the KPOP and the adjudication. *See* J.A. 71-72, 85, 89-101, 115-135. In fact, it contravenes

common sense that the Tribes will be more candid and honest if their communications are secret. Instead, the Tribes will be even more motivated, under a guarantee of secrecy, to raise the level and tenor of their advocacy.[12]

Similarly, several documents withheld by the Government were supplied by an attorney hired by the Klamath Tribe to individually represent and protect the Tribe's interests. J.A. 40-46; App. 1a, *infra*. The Tribe's attorney is not an attorney for the BIA, and therefore, has an undivided loyalty to vigorously represent the interest of the Tribe as his client. *See Hickman v. Taylor*, 329 U.S. 495, 510 (1947) (a lawyer must "faithfully protect . . . the rightful interests of his clients"); *see also Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976) (an attorney's duty is one of "undivided loyalty which an attorney owes to each of his clients"); *In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 161 (3rd Cir. 1984) (an attorney owes a client a "duty of vigorous advocacy"). The American Bar Association Model Rules of Professional Conduct, moreover, provide that an attorney "should act with commitment and dedication to the interests of the client and with zeal and advocacy on the

[12] This case is further distinguished from the typical agency relationship involving consultants in that when a party retains a consultant to address issues outside that party's expertise, there generally is a duty of confidentiality going each way. Specifically, the consultant is normally prohibited under the terms of the retention from divulging to third parties any of the information or conclusions reached in performing the consultant work. Here, however, there are no restrictions on the Tribes divulging or sharing their recommendations and analysis with outside parties.

client's behalf." ABA Model Rules of Professional Conduct, Rule 1.3(1) (1999). Given the Tribe's attorney's duty to vigorously represent the interests of the Tribe (and only the Tribe), the several withheld letters from the Tribe's attorney simply cannot be considered the type of neutral, objective advice that may otherwise be shielded under the deliberative process privilege. These documents necessarily lack the neutrality and objectivity that one would expect from a consultant working for an agency.

In *County of Madison, N.Y. v. United States Dept. of Justice*, 641 F.2d 1036 (1st Cir. 1981), the First Circuit was faced with circumstances similar to the situation presented here, and its decision offers a good model for resolution of this case. In *County of Madison*, the United States asserted the same "functional test" and trustee/fiduciary privilege arguments that it advances here, and those arguments were rejected. *Id.* at 1040-1042. There, the withheld documents were actual settlement correspondence between the Oneida Indian Nation's attorneys and the Department of Justice regarding settlement of a separate Indian claims case brought by the Oneidas against the United States. The county, who was a defendant in a similar suit brought by the Oneidas, sought disclosure of these settlement correspondence documents under FOIA. *Id.* at 1038-1039. The United States acknowledged that the withheld documents were " 'not literally inter- or intra-agency letters.' " *Id.* at 1039. Nonetheless, the United States argued, as it does now, that the court should rely on cases that protect communications from outside consultants, called upon to assist in internal decisionmaking, as precedent for reading Exemption 5 broadly enough to encompass the withheld

documents. *Id.* at 1040. In rejecting this argument, the court stated that it could "perceive of no way . . . to describe the Oneidas' lawyers as 'intra-agency' – that is to say 'within the Department of Justice' – that does not simply omit the term 'intra-agency' from the Act in pursuit of policy ends . . . [and] that expanding exemption five to include self-seeking petitioners 'within' agencies would do more violence to statutory language than Congress' direction permits." *Id.* at 1040-1041. The court also rejected the United States' argument that the documents were protected by Exemption 5 due to its "unique fiduciary relationship with the Oneidas and Indians in general." *Id.* at 1042.

In the instant case, the facts favoring disclosure are significantly more compelling. When the Klamath Basin Tribes communicate with the Government, they have their own interest in mind. The Tribes aggressively advocate government action – the reallocation of water – which they assert would benefit them, and which most surely would be injurious to agricultural communities and the Association's members. The Tribes pursue their ends with every available strategy. They make political overtures to the Office of the Secretary. E.R. 385. They threaten lawsuits. J.A. 72, 83-101, 115-123. They prepare technical reports to support their advocacy. J.A. 115-118; E.R. 345-364. They demand that irrigation diversions be shut off. J.A. 86-89, 122.

The United States seeks to distinguish *County of Madison* on the basis that in this case "there is no litigation between the United States and the Tribes," and "with respect to the documents relating to the Oregon adjudication . . . the Tribes and the United States are in effect co-

partic with an obvious community of interests." Reply Brief for the Petitioners on Petition for Writ, at 8 n.5. The Tribes however, expressly threatened to sue Interior on at leas four occasions before, during, and after the KPOP proces, and the period covered by the FOIA requests in issue. J.A. 72, 85, 89-101, 119-123. Just as in *County of Madison*, therefore, the Klamath Basin Tribes were, and remair, potential adversaries to Interior. In addition, the United States cannot fairly claim that it has a singular "community of interests" with the Klamath Tribe in the adjudication given its contemporaneous obligations to file clams for and consider the interests of the Klamath Project irrigators in the adjudication. In any event, by orderirg the disclosure of actual settlement communications, which should be the least subject to disclosure, *County of Madison* emphasized the importance of adhering to he plain language of the FOIA, and of construing FOIA Exemption 5 narrowly.

The United States also asserts that the D.C. Circuit's decisio in the *Public Citizen* case supports its position, noting hat the court there found Exemption 5 applicable to protect correspondence between the National Archives and former Presidents Ronald Reagan and George Bush relating to access to their respective presidential records. 111 F.3d at 169. Govt. Br. 30-31, 41. The plaintiffs there argued that the former president "has a distinct and independent interest that makes him an adversary," *id.* at 171, but offered no objective evidence of an adversarial relationship. The court explained that "[a]t some point, of course, features of the other relationships (above all, a

possible future adversary one) might come to eclipse the consultative relationship, but plaintiff has offered nothing concrete to suggest any movement in that direction here." *Id.* Lacking any concrete evidence of an adversarial relationship, the court found that "the potential for an adversary relationship is not enough to negate one of consultation." *Id.*

Unlike the role played by the former presidents under the Presidential Records Act, 44 U.S.C. §§ 2201-2207 (1994), in consulting in connection with the proper disposition of their records, here, there is overwhelming evidence of the Tribes' advocacy-based and oftentimes adversarial relationship with Interior, and these features have clearly eclipsed any neutral consultative relationship that may otherwise have existed. As a result, the *Public Citizen* case undercuts the United States' argument that the Tribes stand in the role of consultants for the purposes of the FOIA Exemption 5. The Klamath Basin Tribes' relationship with Interior and the Association regarding the water rights disputes in the Klamath River Basin, preclude the possibility of any truly neutral consultative role that the Tribes may have in the United States' deliberations pertaining to the KPOP and the adjudication processes.

For the foregoing reasons, if the Association filed a lawsuit against Interior regarding the KPOP and served discovery requests for copies of correspondence between Tribes and Interior agencies, the documents would not be shielded by the deliberative process privilege. The same would be true if the Association sought disclosure of the documents from Interior in the context of the adjudication. Accordingly, the seven withheld documents are not

normally privileged in the context of civil litigation against the United States, and the documents, therefore, do not qualify as intra-agency communications that are exempt from disclosure under Exemption 5.

2. A Trustee-Beneficiary Relationship Does Not Give Rise to a Privilege Against Judicial Discovery, and Does Not Otherwise Qualify the Withheld Documents As Intra-Agency Communications

The Government repeatedly emphasizes (Govt. Br. 4-5, 10, 17, 34-38) its trust responsibility to protect Indian tribe resources and an asserted duty of confidentiality that accompanies this responsibility. *See also Nevada*, 463 U.S. at 128; *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). Stripped to its essence, the Government's claim in this case is that this trust relationship is sufficient to satisfy the intra-agency test, and trigger an exemption to FOIA disclosure. Govt. Br. 34. Primarily because the trustee-beneficiary relationship confers no privilege against disclosure, the Government's argument is wholly without merit.

First, there is no privilege against disclosure of trustee-beneficiary communications.[13] While it is true that trust responsibilities include a duty of confidentiality

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[13] Indeed the Government itself appears to be well aware of this fact by expressly acknowledging that it "has never asserted a 'trustee-beneficiary' privilege as a basis for finding that the documents satisfy the *second* requirement of Exemption 5 – *i.e.*, that they are 'not available by law in litigation.' " *See* Reply Brief for the Petitioners on Petition for Writ, 9 (emphasis in original).

(*see, e.g.*, 5 W. Fratcher, *Scott on Trusts* § 505 (4th ed. 1989)), it is also black letter law that "the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege." 8 *Wigmore on Evidence* § 2286, at 528 (J. McNaughton rev. 1961); *accord, e.g.*, 2 C. Mueller & L. Kirkpatrick, *Federal Evidence* § 171, at 224-25 (1994). Thus, "in the absence of a statute to the contrary a confidential communication between partners, or to a clerk, *trustee*, commercial agency, banker, journalist, broker, employee of an adjustment bureau, surety, accountant, or to any other person . . . is not privileged from disclosure." 8 *Wigmore on Evidence* § 2286, at 529-30 (emphasis added). This Court, and numerous lower federal courts, have recognized this basic principle and have consistently refused to create privileges simply because the assertedly privileged communication was "confidential." *See, e.g., University of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (applying this principle in finding no federal privilege for confidential peer review materials); *Couch v. United States*, 409 U.S. 322, 335 (1973) (no privilege for confidential accountant-client communications); *Branzburg v. Hayes*, 408 U.S. 665, 681 n.21 (1972) (no reporter's privilege against grand jury testimony); *FCC v. Schreiber*, 381 U.S. 279, 296 (1965) (no privilege against disclosure of confidential documents to the FCC); *O'Neil v. Q.L.C.R.I., Inc.*, 750 F. Supp. 551, 556 (D.R.I. 1990) (no banker-customer privilege); *Krumme v. West Point-Pepperell, Inc.*, 735 F. Supp. 575, 579 (S.D.N.Y. 1990) (no actuary-client privilege).[14]

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[14] Even the (unprivileged) duty of confidentiality that is owed by a trustee to a beneficiary is a qualified one. The trustee is not required to maintain confidentiality simply for its own sake, but, rather may not disclose information obtained from the beneficiary where the trustee "should know that the effect of such disclosure would be detrimental to the interest of the beneficiary." Restatement (Second) of Trusts § 170 cmt. s (1959). Thus, this duty is typically breached where the trustee discloses confidential information to a third party that results in a pecuniary loss to the beneficiary. *See generally* 5 *Scott on Trusts* § 505. Here, the government has not demonstrated any such potential harm to the Tribes that would be caused by disclosure of the documents at issue. Instead, it apparently argues that the "harm" is the disclosure itself. *See, e.g.*, Govt. Br. 34.

Thus, it is simply not true that the disclosure of the documents at issue imposes upon the Indian tribes some unique "Hobson's choice" (Govt. Br. 34-36). To the contrary, the Tribes face the same risk that *every other* beneficiary reporting information to a trustee faces: in litigation, that information, however "confidential," enjoys no special privilege from production. Therefore, whatever chilling effect the possibility of this disclosure might have on the Tribes' willingness to disclose information to the Government (Pet. Br. 36-37), that chilling effect is likewise no different from that experienced by *any other* beneficiary.

Second, as Justice Douglas observed twenty-five years ago, "the Freedom of Information Act creates no privileges." *Chamber of Commerce of the U.S. v. Legal Aid Soc'y of Alameda Cty.*, 423 U.S. 1309, 1310 (1975) (Douglas, J. as Circuit Justice); *accord, e.g., Badhwar v. United States Dep't of the Air Force*, 829 F.2d 182, 184 (D.C. Cir. 1987); *Ass'n for Women in Science v. Califano*, 566 F.2d 339, 342 (D.C. Cir. 1977). Thus, to decide whether federal courts should recognize a novel "trustee-beneficiary" privilege in this

FOIA litigation would be improper, as Exemption 5 does not create "novel privilege[s]" or take cognizance of privileges that have "found less than universal acceptance." *United States v. Weber Aircraft Corp.*, 465 U.S. at 801.

Third, this Court has clearly held that, where Congress has imposed on the Secretary of the Interior a duty "to carry water on at least two shoulders," the government "cannot follow the fastidious standards of a private fiduciary" when performing its trust duties to Indian tribes. *Nevada v. United States*, 463 U.S. at 128. Here, Congress has "obliged [the government] to represent other interests" (*id.*) – namely, the polity's interest in open government – by requiring the Secretary to comply with FOIA's broad disclosure requirements even while performing trust obligations to Indian tribes. Thus, even with respect to the unprivileged duty of confidentiality, the government "does not 'compromise' its obligation" to the tribes "by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do." *Id.*[15] Indeed, even Interior's own operating manual recognizes that "information

[15] *See also Skokomish Indian Tribe v. Federal Energy Regulatory Comm'n*, 121 F.3d 1303, 1308-09 (9th Cir. 1997) (Indian Tribes not afforded "greater rights than they would otherwise have under [Federal Power Act] and its implementing regulations."); *Morongo Band of Indians v. Federal Aviation Admin.*, 161 F.3d 569, 574 (9th Cir. 1998) ("Although the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.").

received [from Indian tribes] shall be deemed confidential, *unless otherwise provided by applicable law.*" J.A. 58 (emphasis added). Similarly, the Memorandum of Agreement between the Tribes and Interior regarding the KPOP states: "Nothing in this Agreement is intended to or shall have the effect of constraining or limiting the United States in carrying out its obligations under law . . . " J.A. 64. Furthermore, promises of confidentiality by Interior could never, in themselves, create an exemption from FOIA disclosure, absent a return to the pre-FOIA days of non-disclosure for "good cause found." *See* p. 14, *supra*.

In this same vein, this Court's decision in *Nevada v. United States* clearly recognizes the United States' dual obligations toward its Indian interests and its reclamation project contractors, by rejecting the argument that the Government's trust obligations to the tribes prevented it from fulfilling other important obligations to irrigators under the Reclamation Act of 1902, 32 Stat. 388. While acknowledging the " 'distinctive obligation of trust incumbent upon the Government in its dealing with Indian tribes' " (463 U.S. at 127 (internal citation omitted)), the Court also noted that "Congress, in its wisdom, when it enacted the Reclamation Act of 1902, required the Secretary of the Interior to assume substantial obligations with respect to the reclamation of arid lands in the western part of the United States." *Id.* at 128; *see also id.* at 142 (acknowledging government's "duty to obtain water rights for reclamation projects").

The Government argues that the Klamath Tribe is placed "at a distinct disadvantage vis-à-vis other claimants in the Oregon adjudication" because the Tribe's communications with the United States will be subject to

disclosure, while the other claimants may assert all available privileges for communications between themselves and their representatives (Govt. Br. 16, 43). Such assertions, of course, ignore the fact that Interior has disclosed correspondence between the United States and the Association's members regarding the very same matters in issue here. J.A. 81, 102-110; Pet. App. 37a. This one-way street created by Interior indicates a failure to acknowledge Interior's competing obligations toward the Klamath Basin Tribes and its Klamath Project contractors. In addition, the United States is contemporaneously pursuing its Project water rights claims for its own benefit, and the benefit of Project landowners and irrigators, and both the irrigators and the Tribe are represented by their own attorneys in the adjudication. *See* p. 7, *supra*. Thus, the Klamath Tribe may still assert all available privileges regarding correspondence with its own attorneys and expert consultants in the adjudication, just as the irrigators may with their attorneys and experts. Accordingly, rejecting the Government's attempt to expand Exemption 5 in this case will simply place the Association members and the Tribe on equal footing with regard to their correspondence with the United States in the adjudication, as well as the KPOP.[16]

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[16] Any implication, moreover, that the documents are privileged simply because the BIA (and not some other Interior agency) is the recipient is incorrect. Govt. Br. 46-47. In this regard, the Secretary of the Interior has the responsibility and power to direct and supervise all the duties of the United States relating to Indian tribes. 43 U.S.C. § 1457. While the BIA manages the day-to-day issues arising from the government's broad trust obligation to the tribes, each bureau of the Department of the Interior shares the same general trust

Fourth, Congress has long been aware that FOIA requires agencies to disclose certain Indian trust information. And, despite requests from Interior and tribal interests, Congress has declined to amend FOIA to exempt the type of information that the Government now seeks to withhold. In 1976, Senator Domenici introduced S. 2652, which proposed a tenth exemption to FOIA that would exempt from disclosure "information held by a Federal agency as trustee, regarding the natural resources or other assets of Indian tribes or band or groups or individual members thereof." *See Indian Amendment to Freedom of Information Act: Hearings on S. 2652 Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs*, United States Senate, 94th Cong., 2nd Sess. (1976) (hereinafter "Hearings on S. 2652"). In hearings before the Senate Committee on Interior and Insular Affairs, Senator Domenici stated, and the Committee agreed, that "disclosure required under the Freedom of Information

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obligations. *See, e.g., Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1973); *see also* F. Cohen, *Handbook of Federal Indian Law*, Ch. 3, Sec. C2c, at 225 (1982 ed.) (noting that government's trust obligations not limited to BIA). Interior has established policies and procedures regarding Indian trust responsibilities that apply uniformly to all department offices and bureaus to follow. *See* Department of Interior Manual, Part 512, Ch. 2, "Departmental Responsibility for Indian Trust Resources." J.A. 55-56. Moreover, every bureau of Interior reports to the Secretary. Thus, when the government's trust responsibility to tribes is discussed in terms of the "Secretary of the Interior," that title necessarily encompasses all the bureaus within Interior. *See* 43 U.S.C. § 1457. Accordingly, tribes cannot establish a privilege for their communications as against other bureaus in Interior simply by directing the documents to the BIA.

Act applies to information acquired or held by the government by virtue of the Trust Relationship just as it does to all other nonexempt information." Hearings on S. 2652 at 1, 2, 11. Indeed, Interior recognized that FOIA's existing exemptions did not allow withholding of such information and asked the Committee to address the "problem" of perceived conflicting obligations to tribal interests and third parties seeking documents under FOIA. *Id.* at 6-9. Notwithstanding Interior's requests to protect Indian trust information, Congress did not enact S. 2652.

Two years later, Congress again considered a bill designed to protect Indian trust information – the "Indian Trust Information Protection Act of 1978." S. 2773, 95th Cong., 2d Sess. (1978). The proposed Trust Information Protection Act would have prohibited the disclosure of information held by the federal government in its trust capacity. *Id.* at § 2(b). Had this legislation been enacted, FOIA Exemption 3, which allows agencies to withhold information "specifically exempted from disclosure by statute" (5 U.S.C. § 552(b)(3)), would have prevented agency release of trust information. But the Trust Information Protection Act, like the proposed FOIA amendment, failed to gain Congress' support. *See Indian Law Resource Center v. Department of the Interior*, 477 F. Supp. 144, 147 n.3 (D.D.C. 1979).

Where "Congress has considered extending various forms of limited protection" contained in a statutory scheme, but has "explicitly refused" to do so, this Court has declined to accomplish the extension by judicial decision. *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489

U.S. 141, 167 (1989). The Court should likewise refuse to engraft a twice-rejected enactment onto FOIA here.

In summary, the Government's attempt to expand the reach of Exemption 5 to protect its communications with Indian Tribes that occur within the purview of their trust relationship would, for all practical purposes, implicate nearly all communications between Indian Tribes and the United States. This expansion of Exemption 5 ignores the general trustee-beneficiary principles, which do not provide for a trustee-beneficiary privilege, and is directly contrary to Congress' and this Court's mandates that FOIA's exemptions must be narrowly construed. Moreover, this expansion is particularly unnecessary given the other FOIA exemptions that could apply under other circumstances to protect communications that the United States seeks to withhold. *See* note 10, *infra*. For the foregoing reasons, this Court should not countenance the Government's assertion that its trust relationship with the Tribes satisfies the intra-agency test, or otherwise provides a privilege against disclosure, under FOIA Exemption 5.

3. The Government Studiously Avoids Claiming an Attorney-Client Relationship Because the Government's and the Tribes' Interests Are Not Aligned and Potentially Conflict

While the Government repeatedly states that it performs "representational functions" for the Tribes (Govt. Br. 18, 25, 29, 33, 39, 42-43, 45), it has studiously avoided any claim that it maintains an attorney-client relationship

with the Tribes. The fact that the Government does not serve as the Tribes' attorney, even as it regularly represents their interests, further demonstrates the lack of singularity of interest between the Government and the Tribes, and the inappropriateness of viewing their communications as intra-agency in nature.

By undertaking an attorney-client relationship, the government would lose the ability to advocate water right allocations that best served its varying duties and responsibilities with regard to federal reserved rights and reclamation project water rights. The government "often represents varied interests in litigation involving water rights," *Arizona v. California*, 460 U.S. 605, 627 (1983); *see also United States v. Nevada*, 412 U.S. 534, 536 (1973), and has "responsibility to advance, at the same time, the national interest in land and water use as well as the interests of the Indians for whom the government acts as trustee." F. Cohen, *Handbook of Federal Indian Law* 597 (1982). Courts have noted that "Tribal interests may not coincide with national interests." *Manygoats v. Kleppe*, 558 F.2d 556, 559 (10th Cir. 1977). Further, "whatever allegiance the government owes to the tribes as trustee is necessarily split among the . . . competing tribes involved in the case." *Wichita and Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 775 (D.C. Cir. 1986).

The Government could not continue this essential role of balancing many interests, and also fulfill its duty of loyalty to the Tribes that lies at the heart of the attorney-client relationship. *See generally* Restatement (Third) of the Law Governing Lawyers ch. 8 (2000); ABA, Model Rules of Professional Conduct 1.7, 1.8, & 1.9. Here, the

Government is representing various conflicting interests in the adjudication. The Government is pursuing federal "reserved" water rights claims (such as tribal, national forests, wildlife refuges), and is simultaneously pursuing its claims to assert and protect irrigation water rights in the Klamath Project. In addition, Interior is attempting to resolve disputes among the many competing interests in carrying out its decisions under the KPOPs. These decisions involve considering the Klamath Tribe's demands that more water be held back in Upper Klamath Lake, against the three downstream tribes' demands that more water be released to the Klamath River to provide greater instream flows. Pet. App. 2a. Indeed, all of the Tribes are ably represented by their own legal counsel who press their interests in the KPOP, and the Klamath Tribe has its own attorneys in the adjudication. J.A. 80.

Accordingly, the fact that the Government does not maintain an attorney-client relationship with the Tribes is consistent with the same divergence of interests that prevents their communications from being intra-agency in nature.

4. Any Assertion of Work Product Privilege Is Foreclosed by the Absence of Common Interest Between the Government and the Tribes

The Government asserts that two of the seven documents are protected from disclosure because they are attorney work-product. Govt. Br. 12, 28, 42-43; J.A. 40, 44. An attorney for the Klamath Tribe prepared both of these

documents and transmitted them to the Government. J.A. 40-41, 44-45. One discusses the KPOP, and the other discusses the adjudication. *See* note 7, *infra*; App., *infra*, 1a. Even if these memoranda could be considered the work product of the Klamath Tribe's attorney, the attorney's decision to disclose them to the Government waived any work product protection because there is not a sufficient "common interest" between the Government and the Tribe to preserve the privilege.

An extension of the joint defense privilege, the common interest privilege was first recognized in the context of criminal co-defendants whose attorneys shared information in the course of devising a joint strategy for their clients' defense. *See, e.g., Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822 (1871); *United States v. Schwimmer*, 892 F.2d 237, 243-44 (2d Cir. 1989). The privilege has since been applied in both civil and criminal cases, and to jointly interested defendants and plaintiffs. *See, e.g., In re Grand Jury Subpoenas 98-3 and 89-4*, 902 F.2d 244 (4th Cir. 1990) (civil co-defendants); *In re LTV Securities Litigation*, 89 F.R.D. 595 (N.D. Tex. 1981) (potential co-parties to prospective litigation); *Schachar v. American Academy of Ophthalmology*, 106 F.R.D. 187 (N.D. Ill. 1985) (plaintiffs pursuing separate actions in different states); *Transmirra Prods. Corp. v Monsanto Chem. Co.*, 26 F.R.D. 572 (S.D.N.Y. 1960) (civil defendants in separate civil actions). In those cases where the common interest privilege has been applied, the parties seeking its protection have shared information for the purpose of mounting a common defense or prosecution against a common adversary.

The principle is illustrated by *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285 (D.C. Cir. 1980). In *AT&T*,

MCI Communications Corp. and the United States had filed essentially identical antitrust suits against AT&T in different federal district courts. *Id.* at 1288. At the Government's request, MCI disclosed explanatory material that would help the Government understand various documents and other evidence obtained from AT&T during discovery in the Government's antitrust suit. *Id.* The explanatory material was MCI attorney work product, which AT&T sought to obtain from the Government by claiming that MCI had waived the protection by disclosure. *Id.* at 1289. The court of appeals rejected AT&T's waiver argument, holding that parties who "anticipate litigation against a common adversary on the same issue or issues" have a "common interest" in "sharing the fruit of the trial preparation efforts." *Id.* at 1299.

The Tribes and the Government share no common interest remotely analogous to that present in *AT&T*. As discussed above (*see* pp. 5-8, *supra*), the Government represents or balances various conflicting interests both in the adjudication and in the KPOP proceedings. Indeed, the Tribes' decision to hire their own counsel and numerous threats of litigation against the Government (Pet. App. 57a) demonstrate that, far from being "common", the Government's and Tribes' interests are potentially adversarial. Federal courts routinely hold that the protections of the work product are waived upon disclosure in a way that exposes the work product to a potential adversary.[17] Thus, this divergence of interests

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[17] *See, e.g, In re Imperial Corp. of Am. Related Litig.*, 167 F.R.D. 447, 454 (S.D.Cal. 1995); *First Pac. Networks, Inc. v. Atlantic Mut. Ins. Co.*, 163 F.R.D. 574, 582 (N.D. Cal. 1995); *Griffith v. Davis*, 161

between the Government and the Tribes, which again highlight why all of the documents withheld by the Government are not properly considered "intra-agency communications," waives any possible work product protection that might otherwise apply to a subset of the documents.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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F.R.D. 687, 699 (C.D. Cal. 1995); *Niagra Mohawk Power Corp. v. Stone & Webster Eng'g Corp.*, 125 F.R.D. 578, 590 (N.D.N.Y. 1989); *Chubb Integrated Sys., Ltd. v. Nat'l Bank of Washington*, 103 F.R.D. 52, 63 (D.D.C. 1984).

APPENDIX A : INDEX TO DOCUMENTS REMAINING IN DISPUTE

DOCUMENT NUMBER	DATE	FROM	TO	DEFENDANTS' VAUGHN INDEX DESCRIPTION	PRIVILEGE CLAIMED	PROCEEDING CONCERNED
3/96-168 (7 pages)	1/19/96	Klamath Tribes Department of Natural Resources (authored by Bud Ullman, atty. for Klamath Tribes; see **E.R. 470**)	Cathy Wilson (BIA); also sent to Office of the Solicitor, Division of Indian Affairs	Seven page position paper discussing legal theories concerning the water rights of the federally recognized Indian tribes of the Klamath Basin. **(J.A. 40)**	Attorney Work-Product and Deliberative Process **(J.A. 40)**	KPOP **(E.R. 470)**
6/96-168 (1 page)	1/24/96	Cathy Wilson (BIA)	Tom Strekal (BIA), Doug Tedrick (BIA), Richard Cross (atty. for Yurok Tribe), and Bud Ullman (atty. for Klamath Tribes)	One page memorandum. The memorandum contains views on policy the BIA could provide to other governmental agencies concerning the obligation to protect Indian trust assets in developing an operations plan for the Klamath Project. Specifically, the memorandum considers proposing language as guidance regarding the trust responsibility. **(J.A. 42)**	Deliberative Process **(J.R. 42)**	KPOP **(J.A. 42)**
10/96-168 (5 pages)	2/8/96	Bud Ullman (atty. for Klamath Tribes)	Tom Strekal (BIA)	Five page position paper with fax transmittal sheet. On 12/3/96, the Dept. released the fax transmittal sheet accompanying this documents. The paper expresses views concerning trust resources in light of the Fish and Wildlife Service's proposal regarding listed species and the resulting implications on lake management. **(J.A. 43)**	Deliberative Process **(J.A. 43)**	KPOP **(J.A. 43)**
16/96-201 (3 pages)	5/23/96	Bud Ullman (atty. for Klamath Tribes)	Lynn Peterson (Regional Solicitor)	Three page letter discussing the Klamath Basin Adjudication. This letter concerns the water rights claims being prepared on behalf of the Klamath Tribes. **(J.A. 44)**	Attorney Work-Product and Deliberative Process **(J.A. 44)**	Adjudication **(J.A. 44-45)**
20/96-201 (1 page)	6/18/96	Jeff Mitchell (Klamath Tribes)	Stan Speaks (BIA)	One page letter with attachment. Letter references the attachment and highlights the issues therein. Attachment is the three page 5/23/96 letter from Bud Ullman to Lynn Peterson discussing the Klamath Basin Adjudication (identified by FOIA document number 16/96-201). See analysis above regarding the rationale for withholding the attachment. **(J.A. 45)**	Deliberative Process **(J.A. 45)**	Adjudication **(J.A. 46)**
25/96-201 (3 pages)	6/28/96	Bud Ullman (atty. for Klamath Tribes)	Stan Speaks (BIA)	One page letter with two page attachment. Letter references the attachment and highlights the issues therein. Attachment is the Klamath Tribes' resolution regarding the Tribes' water right claims in the Klamath Basin Adjudication. **(J.A. 46)**	Deliberative Process **(J.A. 46)**	Adjudication **(J.A. 46-47)**
27/96-201 (11 pages)	7/1/96	Jacob Kahn (Klamath Tribes)	Cathy Wilson (BIA)	Two page memorandum, nine pages of graphs, and a fax transmittal sheet. The memo concerns biological factors affecting trust resources. On 12/27/96, the Dept. released the fax transmittal sheet accompanying this document. **(J.A. 47)**	Deliberative Process **(J.A. 47)**	KPOP **(J.A. 48)**